

In the Matter of : Case No. 97-15551  
Elzena R. Robinson :  
Debtor : **AMENDED OPINION**

We have before the court for resolution debtor's motion seeking to reclassify the condominium association's secured claim as a general unsecured claim and to ~~A~~strip off<sup>4</sup> the association's lien because it is wholly undersecured.

The debtor, Elzena R. Robinson, filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code on June 12, 1997. The debtor scheduled her personal residence at 1008 Timber Creek Village, Lindenwold, New Jersey with a fair market value of \$48,000.00, subject to a first mortgage in the amount of \$63,015.00 held by Norwest Mortgage, Inc. Debtor listed the

Village of Timber Creek Condominium Association (Athe Association@) as an unsecured creditor holding a claim in the amount of \$2,000.00 for outstanding condominium fees. Debtor=s proposed plan envisioned payments of \$400.00 per month for 12 months, followed by \$525.00 per month for 48 months with payment in full to counsel, the IRS, and the Camden County MUA. Arrearages owed to Norwest were to be cured through the plan. Claims held by Franklin Acceptance Corporation and Levitz Furniture were to be crammed down. Unsecured creditors were to receive nothing.

On July 3, 1997, the Association filed an objection to the debtor=s plan, asserting that it held a secured interest in the debtor=s principal residence as a result of a lien for past due condominium fees. As of the date of the debtor=s petition, the Association claims it was due \$3,359.83. The Association filed a secured proof of claim in that amount on July 15, 1997, with reference to a judgment dated March 1, 1996.

On August 13, 1997, the debtor moved to reclassify the Association=s asserted secured claim as a general unsecured claim pursuant to the cram down provisions under 11 U.S.C. ' 506. Because the debtor=s personal residence was overencumbered as a result of Norwest's mortgage, the debtor contends that the Association=s claim has nothing to attach to and should be reclassified as a general unsecured claim without priority. Since the Association does not hold a Asecured claim@ for

purposes of ' 506(a), it is not protected by the anti-modification provisions of ' 1322(b)(2).

### DISCUSSION

At issue in this case is the interplay between 11 U.S.C. ' 506 and 1322(b)(2) as interpreted by the Supreme Court in Nobleman and as applied in the context of stripping off wholly undersecured junior interests. We note first in this respect that the Association disputes its characterization as a wholly undersecured creditor. There appears to be some dispute over the valuation of debtor's principal residence and of the amount due to Norwest.

Debtor has scheduled the fair market value of her condominium as \$48,000.00, and the Association has offered two HUD-1 Settlement Statements as evidence that debtor's property is undervalued. The Association notes that the debtor purchased her property on September 30, 1994 for \$54,500.00. The Association contends that debtor's property is more properly valued around \$55,000. Norwest has filed a proof of claim in this case in the amount of \$61,407.93. Regardless of whether we accept the debtor's valuation or the Association's valuation, the Association's position would still be wholly undersecured.

Section 1322(b)(2) of the Bankruptcy Code provides that the debtor's plan may:

modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.

11 U.S.C. ' 1322(b)(2). At issue here is the language Arights of holders of secured claims.@AAu\*!A\*\*\*!\*\*\*f\*A\*\*A\*\*\*\*A\*f\*\*\*...\*\*f\*A\*!...\*\*\*\*A\*\*\*\*A\*!...\*\*\*\*AVQWIfJA\*\*A\*\*!A...\*\*\*!\*\*\*A\*\*Af\*A\*\*!\*\*\*!...\*\*\*!A\*\*\*!\*\*\*!f!A\*\*\*\*f\*!A\*f\*Af!\*\*\*!A,, \*A\*\*!Av\*\*\*!tAt\*f\*!\*At\*\*\*!\*!Ad\*\*\*\*A\*\*Ao\*, \*!\*f\*A\*#Ab\*!\*\*\*...f\*Atf\*\*\*\*\*Acf\*\*MAVQYAv#t #ATSUMARRTA

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<sup>1</sup> As a preliminary matter, we find that the proper characterization of the Association's lien is as a security interest. The Association argues at different points in its briefs that its interest is a security interest and then later that it is a statutory lien. The confusion occurs because the Association's lien is supported both by the Association's bylaws and by state law. See By-Laws, Section D. Defaults in Payment of Assessments.

A Unit Owner shall, by acceptance of title, be conclusively presumed to have agreed to pay his proportionate share of Common Expenses accruing while he is the Owner of a Unit. The Association shall have a lien on each Unit for any unpaid assessment ... together with interest thereon, court costs and attorneys' fees, if any are incurred by the Board or Association in collecting such assessment. Such lien shall be effective from and after the time of recording in the public records of Camden County of a claim of lien .... Such claim of lien shall include only sums which are due and payable when the claim of lien is recorded.

See also N.J.S.A. 46:8B-21 (AThe association shall have a lien on each unit for any unpaid assessment duly made by the association for a share of common expenses ... upon proper notice to the appropriate unit owner.@). We conclude that the Association's lien is a security interest agreed to by the parties and provided for by statute. See 11 U.S.C. ' 101(53).

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In Nobleman, the debtors proposed under their Chapter 13 plan to bifurcate the claim held by American Savings Bank against the debtors' principal residence into secured and unsecured claims and then to reduce the mortgage to the fair market value of the residence. The debtors proposed to pay the fair market amount plus prepetition arrearages through their plan, and to discharge the remaining unsecured portion of American's claim. Id. at 326, 113 S. Ct. at 2108-09. In response to the bank's objection, the debtors argued that ASection 506(a) provides that an allowed claim secured by a lien on the debtor's property <is a secured claim to the extent of the value of [the] property'; to the extent the claim exceeds the value of the property, it <is an unsecured claim.'@ Id. at 328, 113 S. Ct. at 2109. AUnder this view, the bank is the holder of a <secured claim' only in the amount of ... the value of the collateral property.@ Id.

The Court declined to adopt this view of section 506(a), stating that this Ainterpretation fails to take adequate account of ' 1322(b)(2)'s focus on <rights.'@ Id. The Court explained that section 1322(b)(2):

does not state that a plan may modify Aclaims@ or that the plan may not modify Aa claim secured only by@a home mortgage. Rather, it focuses on the modification of the Arights of holders@ of such claims. By virtue of its mortgage contract with petitioners, the bank is indisputably the holder of a claim secured by a lien on petitioners' home.

Id. at 328-29, 113 S. Ct. at 2109-10.

The Court recognized that a portion of the bank's claim exceeded the value of the collateral and qualified as an unsecured component of the bank's claim under ' 506(a); however, the Court stressed that ~~A~~that determination does not necessarily mean that the ~~r~~ights' the bank enjoys as a mortgagee, which are protected by ' 1322(b)(2), are limited by the valuation of its secured claim.@ Id. at 329, 113 S. Ct. at 2110. The term ~~A~~ rights@ is not defined by the Code, but appears to refer to the mortgagee's rights under the relevant security documents and state law. Id. With respect to a mortgagee, the Court found those rights to include ~~A~~the right to repayment of the principal in monthly installments over a fixed term at specified adjustable rates of interest, the right to retain the lien until the debt is paid off, the right to accelerate the loan upon default and to proceed against petitioners' residence by foreclosure and public sale, and the right to bring an action to recover any deficiency remaining after foreclosure.@ Id. ~~A~~These are the rights that were ~~b~~argained for by the mortgagor and the mortgagee,' and are rights protected from modification by ' 1322(b)(2).@ Id. at 329-330, 113 S. Ct. at 2110 (quoting Dewsnup v. Timm, 502 U.S. 410, 417, 112 S. Ct. 773, 778, 116 L.Ed.2d 903 (1992)).

The Court declined to apply the ~~A~~rule of the last

antecedent under which the operative clause 'other than a claim secured only by a security interest in ... the debtor's principal residence' must be read to refer to and modify its immediate antecedent, 'secured claims.' Id. at 330, 113 S. Ct. at 2111. Instead, the Court found that:

Congress chose to use the phrase 'claim secured ... by' in ' 1322(b)(2)'s exception, rather than repeating the term of art 'secured claim.' The unqualified word 'claim' is broadly defined under the Code to encompass any 'right to payment, whether ... secured or unsecured' or any 'right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether ... secured or unsecured.'

Id. at 331, 113 S. Ct. at 2111. Therefore, the Court determined to read 'a claim secured only by a [homestead lien]' as referring to the lienholder's entire claim, including both the secured and the unsecured components of the claim. Id. Accordingly, 'Section 1322(b)(2) prohibits ... a modification where, as here, the lender's claim is secured only by a lien on the debtor's principal residence.' Id. at 332, 113 S. Ct. at 2111.

Following the Supreme Court's decision in Nobleman, two lines of cases have evolved with respect to the debtor's ability to strip down or strip off wholly undersecured security interests. Both lines rely upon language quoted from Nobleman.

The debtor urges us to adopt the reasoning presented in In re Lam, 211 B.R. 36 (9<sup>th</sup> Cir. BAP 1997). In In re Lam, the court

concluded that the Nobleman decision prohibiting the removal of a partially unsecured claim is decidedly different from requiring a chapter 13 debtor to continue to pay the mortgage contract when the mortgage lien attaches to nothing and the lien ceases to be a secured claim.@ AIf a lien has no 'security' interest in the property of a debtor, its status as a lien is questionable.@ Id. The Arights@ of such a lien holder would be Aempty rights from a practical, if not a legal, standpoint.@ Id. The court pointed out that:

A forced sale of the property would not result in any financial return to the lienholder, even if a forced sale could be accomplished where the lien attaches to nothing. Nothing secures the Aright@ of the lienholder to continue to receive monthly installment payments, to retain the lien until the debt is paid off, or the right to accelerate the loan upon default, if there is no security available to the lienholder to foreclose on in the event the debtor fails to fulfill the contract payment obligations.

Id.

Turning to the Nobleman decision, the court agreed with those decisions which concluded that under Nobleman, Athe mortgagee must qualify as the holder of a secured claim to some extent as determined by ' 506(a).'

@ Id. (quoting In re Plouffe, 157 B.R. 198, 200 (Bankr. D. Conn. 1993)). ANobleman's reference to section 506(a) is meaningless unless some portion of the claim must be secured under ' 506(a) analysis before the creditor is entitled to retain the rights it has under state law.'

@ Id. (quoting In re Williams, 161 B.R. 27, 29-30 (Bankr. E.D. Ky.

1993)). This conclusion is consistent with the legislative history, reflecting congressional intention to protect home mortgage lenders, that ~~A~~because second mortgagees are not in the business of lending money for home purchases, the same policy reasons for protection of first mortgagees under section 1322(b)(2) do not exist for second mortgagees. Id. at 41.

The majority of courts have agreed that strip off of wholly unsecured liens is permissible. See, e.g., In re Purdue, 187 B.R. 188 (S.D. Ohio 1995); Wright v. Commercial Credit Corp., 178 B.R. 703 (E.D. Va. 1995); In re Libby, 200 B.R. 562 (Bankr. D.N.J. 1996); In re Lee, 177 B.R. 715 (Bankr. N.D. Ala. 1995); In re Thomas, 177 B.R. 750 (Bankr. S.D. Ga. 1995); In re Castellanos, 178 B.R. 393 (Bankr. M.D. Pa. 1994); In re Mitchell, 177 B.R. 900 (Bankr. E.D. Mo. 1994). See In re Barnes, 207 B.R. at 592 for other cases. See also 8 Lawrence P. King, Jr., Collier on Bankruptcy, & 1322.06[1][a][i] at 1322-21 (15<sup>th</sup> Rev. Ed. 1997) (~~A~~The Nobleman opinion strongly suggests ... that if a lien is completely undersecured, there would be a different result. The opinion relies on the fact that, even after bifurcation, the creditor in the case was ~~still the Aholder~~ of a ~~A secured claim~~ because petitioners' home retain[ed] \$23,000 of value as collateral.'@)

Recently a second line of cases has developed which declines to allow the debtor to strip off wholly undersecured liens. The

Association urges us to follow this line of cases.

In In re Barnes, 207 B.R. 588 (N.D. Ill. 1997), the court acknowledged the number of cases allowing strip down of a wholly undersecured lien, but declined to adopt the Astill the holder@ dicta of Nobleman. The court pointed out that:

If ' 1322(b)(2)'s protection against modification were limited solely to security interests with underlying collateral, junior mortgagees with a single penny of equity in collateral in the debtor's principal residence would still retain complete protection from a stripdown while junior mortgagees who lacked that penny of equity would find their entire claim stripped off. Nobleman did not foster this absurd result because that decision did not delineate that any level of equity protecting the secured creditors is required for ' 1322(b)(2) protection. Instead, Nobleman flatly held that A[s]ection 1322(b)(2) prohibits [a ' 506(a)] modification where, as here, the lender's claim is secured only by a lien on the debtor's principal residence.@

Id. at 593 (quoting Nobleman, 508 U.S. at 332, 113 S. Ct. at 2111). The court discounted the concurring opinion in Nobleman, which referred to ' 1322(b)(2)'s policy of protecting the home lending market as not being reflected in either the majority opinion or the actual statute. Id. Barnes concluded that A [u]ntil Congress chooses to limit ' 1322(b)(2) in some way, all mortgagees holding security interests in a debtor's principal residence receive protection against any modification of their rights, and may receive increased economic protection of their interest from growing real estate value over the three to five

year life of the Plan. Should that value rise, the creditor stands to benefit thereby, and the debtor may not capture such increase in value through a ' 506(a) stripoff.@ Id. at 594.

Other courts have agreed that strip off is not permissible. See, e.g., In re Neverla, 194 B.R. 547 (Bankr. W.D.N.Y. 1996) (literal and functional interpretation of statute prohibits modification irrespective of value); In re Jones, 201 B.R. 371 (Bankr. D.N.J. 1996). See also 1 Keith M Lundin, Chapter 13 Bankruptcy ' 4.46 at 4-56 (2d ed. 1994) (AThe clear implication of this analysis is that even a completely unsecured claim holder <secured' only by a lien on real property that is the debtor's principal residence would be protected from modification by ' 1322(b)(2), notwithstanding that such an <unsecured' lienholder could not have an allowable secured claim under ' 506(a).@).

We agree with the analysis provided by Judge Schmetterer in In re Barnes and Judge Stripp in In re Jones.

A court analyzing a <stripoff' situation in Chapter 13, therefore, should look first to whether the creditor holds a mortgage secured only by the debtor's principal residence. If so, the creditor's rights under ' 1322(b)(2) may not be modified regardless of the presence or absence of underlying equity in the residence, and there is no right to look to ' 506(a) for valuation. A mortgage stripoff epitomizes a modification of creditor rights and is not allowed in Chapter 13 under ' 1322(b)(2) and Nobelman.

207 B.R. at 592. AThe trigger for Justice Thomas's protection of

rights analysis [in Nobleman] is the existence of a lien, not the presence of value to support that lien.@ Lundin, ' 4.46 at 4-56. The Nobelman court specifically rejected the debtor's argument that the application of ' 1322(b)(2) depends first on a ' 506(a) assessment ~~A~~to determine the value of the mortgagee's secured claim@. 508 U.S. at 328. Rather, as Judge Stripp recognized in Jones, ~~A~~the existence of a mortgage lien . . . determines the application of ' 1322(b)(2), and not the value of the collateral subject to that lien.@ 201 B.R. at 374.

To the extent that the debtor is seeking to strip off the Association's lien, which is secured only by the debtor's principal residence, the debtor's action is proscribed by application of ' 1322(b)(2). In this regard, we note that there is some question as to the extent that the Association's lien is valid. The lien filed by the Association was in the amount of \$705.85 for amounts due through November 20, 1995. The notice of lien includes a statement that: ~~A~~Additional charges, including, but not limited to additional assessments, interest, attorney fees and costs of collection, may hereafter accrue and shall be added to the amount due until fully paid and satisfied.@ This statement, to the extent that it was intended to create a lien that would be augmented by subsequent delinquencies, appears to contradict both the Association's By-Laws and N.J.S.A. 46:8B-21. N.J.S.A. 46:8B-21 provides in relevant part:

The association shall have a lien on each unit

for any unpaid assessment duly made by the association for a share of common expenses or otherwise, together with interest thereon and, if authorized by the master deed or by-laws, reasonable attorney's fees. Such lien shall be effective from and after the time of recording in the public records of the county in which the unit is located of a claim of lien stating the description of the unit, the name of the record owner, the amount due and the date when due. Such claim of lien shall include only sums which are due and payable when the claim of lien is recorded and shall be signed and verified by an officer or agent of the association.

N.J.S.A. 46:8B-21 (emphasis added). The Association's lien is valid only as to the amount due at the time it was recorded, here, \$705.85. We have no evidence in the record that the Association obtained a lien for any of the other prepetition amounts due and owing. Accordingly, these amounts must be viewed as unsecured claims.

Parenthetically, it should be noted that the Association is correct to contend that the debtor retains responsibility to pay post-petition condominium assessments as they are due. See 11 U.S.C. ' 503(b).

We conclude that to the extent the condominium association holds a lien against debtor's property, i.e., \$705.85, the security interest of the Association cannot be reclassified to unsecured status, regardless of the value of debtor's property. Debtor's motion to reclassify is granted to the extent that the remainder of the Association claim may be designated as unsecured.



Debtors counsel shall submit an order in conformance  
herewith.

Dated:      October      , 1997

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JUDITH H. WIZMUR  
U.S. BANKRUPTCY JUDGE

With respect to debtor's motion for sanctions for violations of the automatic stay, the debtor requested the pool pass on June 13, 1997, the day after her filing. The Association has acknowledged that it had notice of the filing at that time. Although at oral argument the Association admitted that it did seek a partial payment of the debtor's prepetition debt, it now contends that it did not violate the automatic stay because the debtor failed to pay the prorated portion of June's fees. Moreover, the Association contends that granting the debtor a pool pass was an affirmative action.

We disagree. Section 362(h) provides that:

An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S.C. ' 362(h). Section 362(a) specifically prohibits any attempts to collect prepetition debts. The Association has stated that it did attempt to do so. This was a willful decision by its Board.

### Other Comments

Other additional arguments were raised by the Association in the context of this dispute, but those arguments are either moot, meritless or immaterial. For example:

1. The Association contends that Association fees that accumulated prior to the bankruptcy petition should be paid as an administrative priority in accordance with 11 U.S.C. '

507(a)(6).<sup>2</sup> Section 507(a)(6) provides a sixth priority to:

allowed unsecured claims of individuals, to the extent of \$1,800 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

11 U.S.C. ' 507(a)(6). There is no indication in the record that the Association made any deposits with the debtor. The only other way that this argument makes sense is if the Association was the debtor.

2. The Association also contends that its lien is not voidable

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<sup>2</sup> The reason for the Association's citation to the case of Vosatka v. Wolin-Levin, Inc., presumably at No. 94 C 4129, 1995 WL 443950 (N.D. Ill. July 21, 1995) is unclear. Vosatka was not a bankruptcy case and there was no mention of ' 507(a)(6). Vosatka involved an action under the Fair Debt Collection Practices Act.

pursuant to section 522(f) because its lien is a statutory lien. See King v. Cherrywood Residents Ass'n, Inc., 208 B.R. 376 (D. Md. 1997) (condominium lien arising under a Maryland statute was a statutory lien). But see In re Beckley, 210 B.R. 391 (Bankr. M.D. Fla. 1997) (concluding that association's lien was a ~~A~~ security interest); In re Phillippy, 178 B.R. 67 (Bankr. M.D. Pa. 1994) (the lien was created by agreement and therefore represented a security interest); In re Bland, 91 B.R. 421 (Bankr. N.D. Ohio 1988) (same). Although we have already accepted that the Association's lien is a security interest, we need not reach this question since the debtor has not yet moved to void the Association's lien pursuant to section 522(f).

3. The Association contends that post-petition assessments are nondischargeable pursuant to section 523(a)(16). This is true, but not at issue here.

4. The Association also contends that the payment of the Association's post-petition expenses should be an administrative priority pursuant to 11 U.S.C. § 503(b)(1)(A). This may be true, but again is not at issue in this dispute.

## SECTION JUDGE WANTED SAVED

The debtor also filed a motion on August 13, 1997 to enforce the automatic stay as to the Association and to impose sanctions, damages and attorney's fees. The debtor claims that the Association willfully violated the automatic stay by not allowing the debtor the use of a swimming pool at the condominium complex post-petition. Although debtor tendered her condominium fees for the month of July, the first assessment due after the filing of her petition, and the Association had knowledge of her filing, the Association refused to allow the debtor access to the pool until the debtor also paid some of her prepetition arrears. The Association allegedly explained that the use of the pool was a **A** luxury<sup>®</sup> and that they were not required to allow the debtor to use it. Debtor contends that this is an attempt to collect a prepetition debt and is evidence of harassment.

We initially heard this matter on September 10, 1997. Additional time was afforded for the parties to make submissions addressing this issue. With respect to the debtor's motion for sanctions, the Association admitted to knowledge of the debtor's bankruptcy at the time and acknowledged that it refused the debtor entry because she did not make any payments toward her prepetition debt. The Association nonetheless argued that it was not required to grant any **Aaffirmative<sup>®</sup>** benefits to the debtor as the result of the automatic stay.